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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

against

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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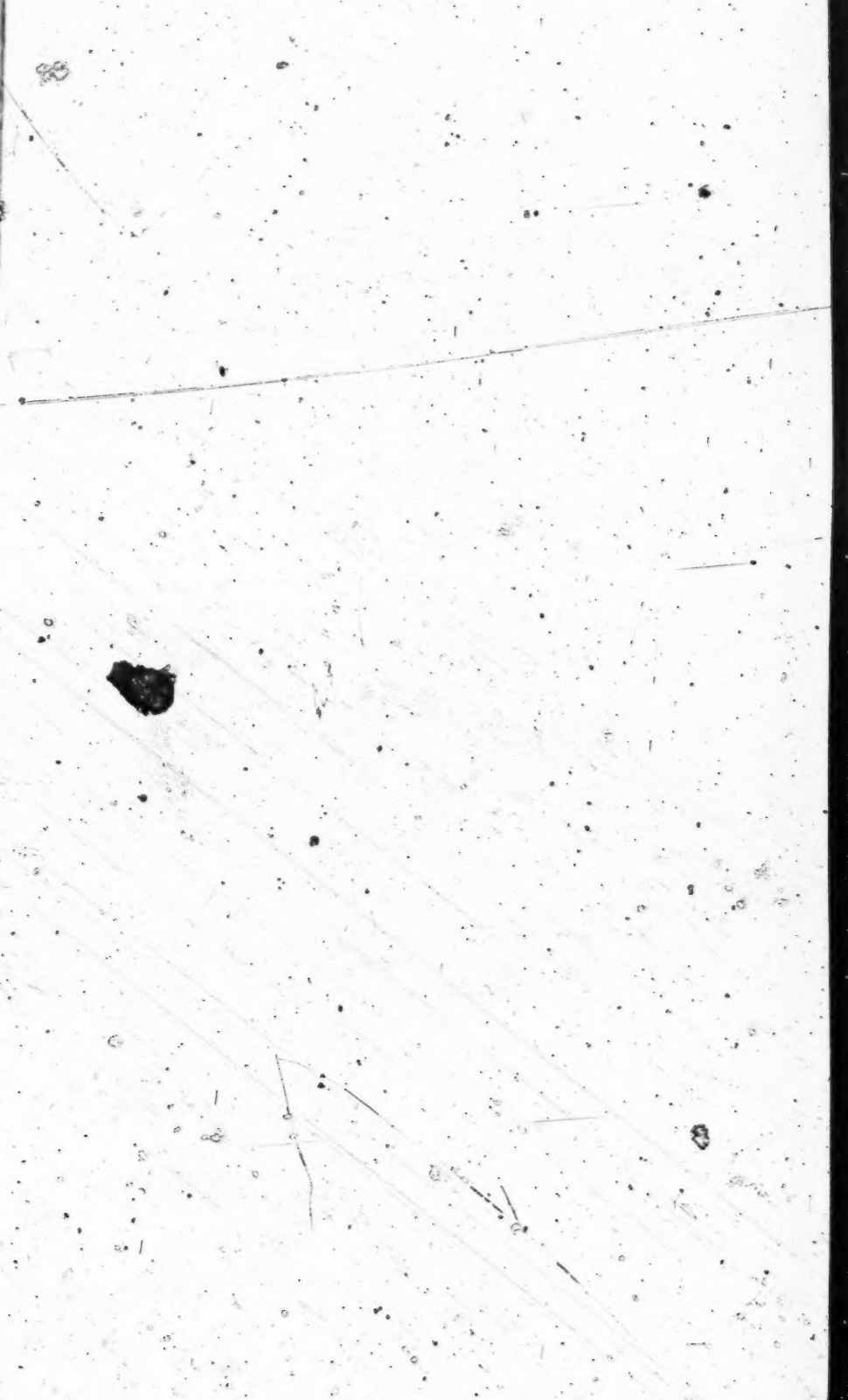

IN THE

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OCTOBER TERM, 1957

FEDERAL DEPOSIT INSURANCE CORPORATION,

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against

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Federal Deposit Insurance Corporation (herein termed "F.D.I.C.") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 25, 1957, which affirmed in part and reversed in part a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in an action brought by F.D.I.C. to recover assessments of Federal deposit insurance for the periods from July 1, 1948 through June 30, 1953.

Opinions Below

The memorandum opinion of the District Court is unreported and is printed in the Joint Appendix on which the case was heard in the Court of Appeals (J. A. 163-64). The opinion of the Court of Appeals is reported in 245 F. 2d 567, and printed in Appendix II to this petition. No petition for rehearing was filed.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented by This Petition

1. In computing assessable deposits, was the defendant bank entitled to deduct from the deposits of other banks the balances in deposit accounts (reciprocal accounts) which it maintains with those same banks?

2. In computing the statutory deduction for uncollected cash items included in deposits on the assessment base days, was the defendant bank entitled to deduct from deposits twice the amount of items not received and forwarded on the assessment base days?

3. Did amounts credited on defendant's books to the "contract reserve account" of sellers of commercial paper constitute assessable deposits?

The adverse decisions on these questions create important problems in the administration of the Federal Deposit Insurance Act, and affect the insurance fund which secures the depositors of insured banks. Their importance rests not only on the specific assessments which have been invalidated, but on the further consequences which will result from the underlying doctrines asserted by the Court below:

> *that a type of deposits (reciprocal deposits) present in over 300 insured banks, in a volume of approximately $670,000,000 in 1950, are not deposits received in the "usual course of business";*
>
> *that a regulation defining the conditions under which uncollected cash items may be deducted from the assessment base was beyond the powers of F.D.I.C.;*

that F.D.I.C. is an agency of the Federal Reserve System, and required to conform to rulings of the Federal Reserve Bank;

that amended regulations which were expressly stated to apply only from their effective date should nevertheless be applied retroactively to earlier assessment periods, giving rise to refund claims that may amount to millions of dollars; and

that accounts arising from the commercial business of a bank are nevertheless not "commercial" accounts and not deposits.

The Court of Appeals also departed from accepted standards of statutory interpretation, in holding that an amendatory statute should be applied to a period before its enactment, in spite of express statements by the two Congressional Committees reporting on it that it represented a *change* in the existing law.

The F.D.I.C. is faced with a dilemma in administering its nationwide system of insurance. Unless it treats what it considers an improper decision in this case as applicable to all banks, and grants millions of dollars in refund claims, it may have to contest similar cases in other circuits until an express conflict arises, leaving the law in confusion in the meantime.

Statutes Involved

The statutory provisions involved are subdivisions (c)(12)(13) and (h)(1) of the 1935 Federal Deposit Insurance Act, 12 U.S.C. § 264, and portions of §§§ 3, 7 and 9 of the 1950 Federal Deposit Insurance Act, 12 U.S.C. § 1813(l), (m) and (p), § 1817(a), § 1819, Tenth. They are printed in Appendix I to this petition *infra*, pp. 32-36.

Statement

F.D.I.C. is a corporation created by Federal statute in 1933,* to insure bank deposits. Defendant, Continental Illinois National Bank and Trust Company of Chicago (herein termed "Continental"), is a national banking corporation, a member of F.D.I.C. and insured by it.

Federal jurisdiction of the case exists by virtue of specific provision of statute, giving the Federal courts jurisdiction of actions in which F.D.I.C. is a party (12 U.S.C. § 1819, Fourth).

F.D.I.C. is financed by assessments on total deposits of insured banks. It receives no appropriations from Congress. Insured deposits differ from the total deposits on which assessments are based, in that insured deposits are restricted to a maximum of $10,000 for each depositor, *after deducting offsets,*** while assessments are computed on total deposit liabilities *without deduction for indebtedness of depositors* and without regard to the amount of a bank's insured deposits.***

Assessments are computed at the rate of 1/12th of 1% per annum on the average liability for deposits as defined in the Act (12 U.S.C. § 1817(a)). Under the 1935 Act it was necessary for insured banks, in their semi-annual statements to F.D.I.C., to average the total deposits for each calendar day of the period (12 U.S.C. § 264(h)(i)). Under the 1950 Act, assessments are now computed on the

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* The temporary statute enacted in 1933, as Section 12B of the Federal Reserve Act, was followed by a permanent statute in 1935 (12 U.S.C. § 264). This section was withdrawn from the Federal Reserve Act, constituted as a separate Federal Deposit Insurance Act and in turn amended in 1950 (12 U.S.C. §§ 1811-31).

** 12 U.S.C. § 264(c)(13), 1935 Act; 12 U.S.C. § 1813(m), 1950 Act.

*** 12 U.S.C. § 264(h)(1), 1935 Act; 12 U.S.C. § 1817 (a), 1950 Act.

average deposit liability on two specific days in each six-month period (12 U.S.C. § 1817(a)).

Three classes of deposits, or claimed deductions from deposits, are at issue on this petition, to wit:

(a) Reciprocal bank balances, involving instances where Continental holds a deposit of another bank and is itself a depositor of that bank;

(b) Uncollected cash items, involving checks and drafts on out-of-town banks, which Continental credited to deposit accounts but which were still in process of collection; and

(c) Dealer reserves, representing sums withheld on installment sales contracts purchased by Continental, and retained as security in an account in the customer's name, pending collection of the paper.*

The District Court, after trial on a stipulation and supplemental testimony, held that Continental was entitled to deduct items (a) and (b) from its assessment base, but that item (c) was assessable as a deposit. The Court of Appeals, on cross-appeals, affirmed the District Court's holding on items (a) and (b), but reversed as to item (c) and held that it was not a deposit.

(a) Reciprocal bank deposits.

Reciprocal accounts exist where two banks maintain deposit accounts with each other. Continental maintained such accounts with twenty-six other banks in nine principal cities throughout the country (J. A. 13). Reciprocal accounts exist in 300 or 400 of the larger banks (J. A. 108).

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* A fourth item, concerning payroll withholdings, was decided in favor of F.D.I.C. by the Court of Appeals, and is not involved in this petition.

F.D.I.C. always insisted under the 1935 Act that assessments be computed on the gross amount of deposits, without deduction for accounts which the reciprocal bank may maintain with the reporting bank (J. A. 69), as the statute expressly prohibited any deduction for indebtedness of depositors.

Continental itself treated reciprocal accounts at their gross amount for most purposes. Their ledger cards were kept intermingled with the accounts of other (non-bank) depositors (J. A. 95). Deposits were made and funds withdrawn by check or advice, in the same manner as deposits and withdrawals from individual or other corporate accounts (Pl. Ex. 7-11; J. A. 155-59). The reciprocal banks followed the same practice on accounts which Continental kept with them (J. A. 95-100).

A typical monthly statement which Continental issued to a Pittsburgh bank showed a balance on deposit with Continental on September 30, 1952, of $2,312,596.12 (Pl. Ex. 9; J. A. 157). No offset was shown on this statement, although Continental on the same date had a deposit of $1,099,146.38 with the Pittsburgh bank, as shown by the monthly statement the latter furnished Continental (Pl. Ex. 10; J. A. 158).

Continental nevertheless deducted deposits by reciprocal banks from its gross deposits, in making its initial semi-annual statements under the Federal Deposit Insurance Act (Pl. Ex. 4; J. A. 147). In 1937, F.D.I.C. notified Continental that this practice was improper, and asked it to file amended certified statements, eliminating such deductions (J. A. 147). Continental thereupon forwarded an additional check and filed amended statements which it described as "in compliance with your letter" (Pl. Ex. 5; J. A. 148). In fact, however, Continental had then omitted all but a small portion of its reciprocal accounts from its total deposits. F.D.I.C. did not discover this fact until a field audit, which was followed by the present suit, covering the periods not already barred by statute of limitations.

When suit was brought, Continental asserted that its practice in deducting balances deposited with reciprocal banks was justified by instructions issued in 1942 by the Comptroller of the Currency with respect to reports of condition of national banks (Def. Ex. 1; J. A. 161), and by the Federal Reserve Bank with respect to reports of member banks for computation of reserves (Def. Ex. 2; J. A. 162). Continental also relied on a retrospective interpretation of a 1950 amendment to the Federal Deposit Insurance Act, discussed below (p. 16, *infra*).

(b) Double deduction of uncollected cash items.

The Federal Deposit Insurance Act has always permitted banks to deduct from their deposits for assessment purposes the amount of their uncollected cash items, commonly called "float". Float consists primarily of checks and drafts on out-of-town banks, deposited to customers' accounts.

Under the 1935 Act, a reporting bank was allowed to deduct from its daily deposit liabilities all uncollected cash items included in such deposits (12 U.S.C. § 264(h)(1), p. 33, *infra*).

Under the 1950 Act, a reporting bank was offered two alternatives, designated as methods (aa) and (bb) (12 U.S.C. § 1817(a)(1)(iii), pp. 34-35, *infra*). Method (bb) was substantially the same as the deduction under the 1935 Act. Method (aa), which Continental used, permitted deducting *twice* the total of cash items "forwarded for collection on the assessment base days • • • which are in the process of collection and which the bank has • • • credited to deposit accounts" (pp. 34-35, *infra*).

Like the change from an average of each day's deposits to an average of only two base days in each six-month period, this alternative method was intended to simplify the banks' work. The double deduction for items forwarded on

the base day was intended to arrive at approximately the same result as the (bb) method, on the assumption that the average time necessary for the collection of such items was approximately two days (J. A. 78-79).* Therefore, deducting twice the amount of cash items forwarded on the base day should give approximately the same result as deduction of all items remaining uncollected on the base day.

In order to expedite collection of "float", Continental kept employees after public business hours on week-day evenings, and also on Saturdays and Sundays. These employees performed the various steps necessary for processing and dispatching for collection cash items drawn on out-of-town drawees and received after the closing of the bank's doors (J. A. 16-17). This practice raised issues which are important especially in the cases where base days fell on a Monday, for Continental entered under the Monday date items which had been forwarded for collection on Friday, Saturday and Sunday, and claimed a deduction *multiplied by two* for all such items (J. A. 17).

Had Continental used the (bb) method, it could have deducted all such items which were not actually collected on the base day; but F.D.I.C.'s regulations under the (aa) method provided that cash items could qualify for *double deduction* only if they were received and forwarded on the base day (J. A. 182-83).

The Court of Appeals held the F.D.I.C. regulations to be inconsistent with the statute insofar as they required items to be *received* on the base day, as well as forwarded on that day (p. 46, *infra*). The reasons for this requirement will be discussed below (pp. 20-21).

In respect of items which were neither received nor forwarded on the base day, the Court of Appeals supported

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* The Time Schedule of the Federal Reserve Bank of Chicago lists a maximum of three days' deferment of availability for collection of items drawn on the most distant point in the United States (Pl. Ex. 6; J. A. 151).

the double deduction by Continental on the ground that F.D.I.C. amended its regulations in 1954 to change the definition of base day, and permit deduction under the (aa) method of items forwarded after the close of business on the preceding business day. The 1954 amendments to the regulations were made after conference between F.D.I.C. representatives and a committee of the American Bankers Association; the Committee was told that the amendments would not be retroactive (J. A. 85-86), and the publication in the Federal Register described them as not retroactive (19 F. R. 1663-J. A. 193). The Court of Appeals asserted that, if F.D.I.C. had authority to make such an interpretation after 1954, the Court had authority to impose the same interpretation before 1954 (p. 48, *infra*).

(c) Dealer reserves.

Continental excluded from its deposits amounts set up in a "contract reserve account" in connection with the financing of commercial paper. Such exclusion has been sustained by the Court below, although the District Court had held these to be deposits and assessable.

Continental purchased installment sales contracts from a customer, without recourse, under a written agreement which provided that Continental should remit to the customer 90% of the face amount (less discount) and credit the remaining 10% to an account on Continental's books designated as the customer's "Contract Reserve" (Ex. A to Stip., J. A. 22).

That the price paid by Continental was par, and the reserved portion was a deposit, was shown by the provision that:

> "you [meaning Continental] will *deposit** in and credit to us [meaning the customer] in an account to

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* Italics throughout the petition have been added by counsel.

be set up on your books, (which account is hereinafter referred to as the 'Contract Reserve') a sum equal to ten per cent (10%) of the amount then owing by the Buyer under such Contract" (J. A. 22).

The customer agreed, as agent for Continental, to collect the payments due under the installment contracts, and remit the proceeds at four-week accounting periods (J. A. 23-24). In case of defaulted contracts, the customer might remit 90% of the unpaid balance to Continental; and if it did not do so, Continental could charge the unpaid balance of any such contract to the Contract Reserve account (J. A. 25). The agreement provided that any sums in the Contract Reserve account above a specified minimum should be released to the customer from time to time (J. A. 25).

The Contract Reserve account was kept with the individual deposit ledgers of the bank, where deposit accounts of other customers were kept (J. A. 118).

Reasons for Granting the Writ

F.D.I.C. is a federal agency, charged by federal statute with the responsibility of carrying out the high purposes of the congressionally declared policy embodied in the Federal Deposit Insurance Act. The issues presented are clearly questions of federal law. *D'Oench Duhme & Co., Inc.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 456 (1942). No case involving F.D.I.C. has been heard on the merits in this Court for the past fifteen years. For the reasons set forth below, we think this case deserves the Court's attention in respect of each of the three items on which the defendant was held free from insurance assessments.

I.

The deduction of reciprocal bank balances involves important questions of federal law, either not yet settled by this Court, or decided contrary to applicable decisions of this Court.

The decision permitting deduction of reciprocal bank balances should be reviewed because:

(a) the ruling that reciprocal deposits are not received in the "usual course of business" casts doubt on the status of substantial items of bank deposits, and conflicts with the principle of the decision of the Fifth Circuit Court of Appeals in *Constitution Indemnity Co.* v. *Shytles*, 47 F. 2d 441 (1931);

(b) the treatment of F.D.I.C. as an agency of the Federal Reserve System decides a basic question concerning F.D.I.C. which has not been heretofore considered by this Court; and

(c) the ruling that the 1950 amendment of the Act should govern assessments prior to 1950 conflicts with applicable decisions of this Court concerning the use of Congressional Committee reports as criteria of legislative intent.

(a) The ruling that reciprocal deposits are not received in the "usual course of business" merits review by this Court.

The reciprocal portions of bank deposits in insured banks involved in 1950 a volume of approximately $670,000,000 (F.D.I.C. Ann. Rep., 1951, p. 59). In holding that reciprocal deposits are not received "in the usual course of business" (p. 41, *infra*), the Court of Appeals has laid

down a rule that may subject F.D.I.C. to further litigation by other banks, and deplete the insurance fund.

The decision has far more mischievous consequences than the mere failure to collect the assessment claims from Continental. If reciprocal deposits are not received in the "usual course of business", they are not deposits at all under the statutory definition (*infra*, p. 33), and even their net amount is not subject to assessment.

The Fifth Circuit Court of Appeals has held that whether a transaction is in the usual course of business depends on whether it is within the reasonable scope of the business and in furtherance of the business, rather than on how often it is repeated. *Constitution Indemnity Co. v. Shytles*, 47 F. 2d 441 (1931). The cited case deals with coverage under a compensation policy; but the holding below, that a course of business followed by over three hundred large banks is not in the "usual course of business" (p. 41, *infra*), clearly conflicts with the principle of the Fifth Circuit decision.

It cannot be said that reciprocal deposits are outside the scope of a bank's business. They would not be maintained unless they served a useful purpose by eliminating delays in collection of items drawn against the reciprocal bank, and by providing an extra service that helps to cement otherwise profitable customer relationships.

The fact that no interest is earned or paid on these reciprocal balances (see p. 41, *infra*) is of no significance, as Federal law prohibits the payment of interest on any demand deposit (12 U.S.C. §§ 371a, 1828(g)). There is no difference between the earning power of demand balances, whether individual or corporate. All are more or less volatile, but the aggregate is all deposit liability and assessable under the statute. The earning power of a deposit is not a standard under the statute.

The concept that only "ordinary deposits" should be subject to assessment was strongly advanced by the defend-

ant banks in *Federal Deposit Ins. Corp.* v. *Irving Trust Co.*, 137 F. Supp. 145 (S.D.N.Y., 1955), and was rejected by the Court after a thorough review of the statutory purpose and background (137 F. Supp. at 155-56). The similarity of this "ordinary deposit" concept to the "usual course of business" test used by the Court below shows that the nature of assessable deposits is subject to such repeated controversy, that it should be settled by this Court.

The doctrine advanced by the Court has relevance to both the 1935 and 1950 Acts, although the specific issue of assessing reciprocal balances has been eliminated by the 1950 Act.

(b) The treatment of F.D.I.C. as an agency of the Federal Reserve System merits review by this Court.

The Court of Appeals cited the treatment accorded reciprocal bank balances by other federal agencies as an important factor, referred to instructions issued by the Comptroller of the Currency and the Federal Reserve Bank, under which only net balances of reciprocal deposits were required to be reported, and said, "The Federal Reserve Bank, *like plaintiff*, was an agency of the Federal Reserve System" (p. 43, *infra*).

In so deciding, the Court of Appeals has created uncertainty concerning the fundamental nature of F.D.I.C. From its inception, F.D.I.C. was created as a separate corporation, not subject to control by either the Comptroller or the Federal Reserve System. F.D.I.C. insurance is available to banks which are not members of the Federal Reserve System (12 U.S.C. § 264(f), 1935 Act; 12 U.S.C. § 1815, 1950 Act). The banks insured by F.D.I.C. at the time of the instructions cited by the Court included 5,081 national banks, 1,598 state banks which were members of the Federal Reserve System and 6,724 state banks which were not members of the Federal Reserve System (F.D.I.C. 1942 Ann. Rep. pp. 68-69). To treat F.D.I.C. as a Federal

Reserve agency when half of F.D.I.C.'s members are not members of the Federal Reserve System, introduces confusion into the relations of both organizations.

Although the Comptroller of the Currency is a member of F.D.I.C.'s three-man board of directors, he has no veto power, and can not be selected as Chairman.* In saying that deposit assessments must conform to the Comptroller's call reports, the Court below gave the call reports an effect which the Comptroller had never claimed for them. The Comptroller is authorized to call for reports of condition from national banks in such form as he may from time to time specify (12 U.S.C. § 161). These "call reports" serve mainly statistical purposes. The Comptroller is not subject to the definition of deposits contained in the Federal Deposit Insurance Act and is free to vary his regulations for call reports as he sees fit without further Congressional action.

The chronology also shows that reliance on instructions from the Comptroller of the Currency and the Federal Reserve Bank was unjustified. Continental adopted its stand for deduction of reciprocal balances in 1937, as an interpretation of the 1935 Federal Deposit Insurance Act, which F.D.I.C. itself had given a contrary interpretation. Netting of reciprocal balances was not permitted by the Comptroller of the Currency or the Federal Reserve until 1942. The Comptroller's 1942 instructions represented a change in practice, "beginning with the current call" (J. A. 161). Federal Reserve also had previously required that reciprocal bank deposits be reported at their gross figures (see *Banking and Monetary Statistics*, 1943 ed., p. 70, a publication of the Federal Reserve Board). Its 1942 circular was described as a "Change in manner of preparing reports of deposits for reserve computation purposes with respect to reciprocal interbank balances" (J. A. 162). The Federal Deposit Insurance Act was amended in 1950 (see

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* 12 U.S.C. § 264(b), 1935 Act; 12 U.S.C. § 1812, 1950 Act.

p. 34, *infra*), but the 1935 Act could not be affected by 1942 rulings of other agencies.

In fact, F.D.I.C. stated in its 1942 report to Congress (pp. 8-9) that it was assessing interbank deposits, and Chairman Crowley testified before the Senate Committee on Banking and Currency on February 17, 1943 that:

> "Not until we have completed our post-war adjustments and have arrived at a comparatively stable post-war economy should we consider any reduction in the assessment rate or any further exemption of types of deposits from assessments." (Hearings on § 700 before Senate Committee on Banking and Currency, 78th Cong., 1st Sess., p. 10.)

The actions of one administrative agency under a statute it is charged with administering cannot be controlled by the action of a different agency administering a different statute. As the Court of Appeals for the Eighth Circuit said in *Helvering* v. *Edison Bros. Stores, Inc.*, 133 F. 2d 575, 579 (1943):

> "Nor can the ruling of one administrative department of the government concerning income accounting control that of another department made for an entirely different purpose under another act of Congress."

See also *Kansas City Southern Ry. Co.* v. *Commissioner*, 52 F. 2d, 372, 378 (8th Cir., 1931); *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 562 (1932).

The decision below is in conflict with the principle of these decisions.

(c) The Court of Appeals disregarded applicable decisions of this Court on the effect of Congressional Committee reports.

The 1950 amendment to the Federal Deposit Insurance Act was relied on by Continental to support its claim for deducting reciprocal bank balances from its assessable deposits.

Under the 1935 Act (quoted at p. 32, *infra*), insurance assessments were based on "the total amount of liability of the bank for deposits (* * * *without any deduction for indebtedness of depositors*)."

The statute makes no differentiation between a deposit liability to a bank customer and to a non-bank customer; nor does it make any differentiation between indebtedness due from a bank depositor and from another depositor. In any case a depositor's indebtedness is not deductible.

The relationship between a bank and a depositor is that of debtor and creditor. *New York County Bank* v. *Massey*, 192 U. S. 138, 145 (1902). Therefore, the deposit of Continental in a reciprocal bank was an indebtedness of that bank to Continental and Continental was forbidden to deduct the amount of such indebtedness in computing its own deposit liabilities.

This was the interpretation which F.D.I.C. consistently gave to reciprocal bank deposits from its creation to the passage of the 1950 statute. This administrative interpretation was entitled to substantial weight (see p. 22, *infra*). Since the assessment of bank deposits for Federal insurance purposes is a creature of statute, the burden is on anyone claiming a deduction from the assessment base to show a statutory basis for such deduction. *Interstate Transit Lines Inc.* v. *Commissioner*, 319 U. S. 590, 593 (1942).

Authority to deduct deposits in reciprocal banks was first given by the 1950 amendment to the Federal Deposit

Insurance Act. The 1950 Act continued the requirement of paying assessments on "the amount of the liability of the bank for deposits * * * without any deduction for indebtedness of depositors", but added a new proviso, in the following terms:

> "*Provided*, That the bank—
>
> "(1) may deduct (i) from the deposit balance due to an insured bank the deposit balance due from such insured bank (other than trust funds deposited by it in such bank) which is subject to immediate withdrawal;" 12 U.S.C. § 1817(a).

The reports of the Congressional committees clearly designated the new proviso as effecting a change in the law. Indeed, that is the usual interpretation when an amendatory statute repeats old language and adds new provisions. *United States* v. *Mc Clure*, 305 U. S. 472, 477-78 (1939); *In re Fuetl*, 247 Fed. 829, 832 (D. Conn., 1917).

In the report of the Senate Committee on Banking and Currency, on the bill which became the 1950 Act, the following statement is made:

> "S. 2822 provides for *changes* in the assessment base. It would permit (a) the deduction from the deposit balance due to an insured bank of the deposit balance due from such insured bank; * * *" (Pl. Ex. 1, J. A. 136; S. Rep. 1269, 81st Cong. 2d Sess., p. 2.)

Similarly, the report of the House Committee on Banking and Currency stated:

> "The assessment base is continued on the total of the bank's deposits. However, in computing the assessment base, *in addition* to the present authorization to deduct therefrom uncollected items and trust funds deposited in another insured bank, the bill permits (a) the deduction from the deposit balance due to an

> insured bank the deposit balance due from such insured bank, * * *'" (Pl. Ex. 2, J. A. 142; H. R. Rep. 2564, 81st Cong. 2d Sess., p. 7.)

This Court has recognized reports of Committees of Congress as among the best criteria of legislative intent, if not actually decisive. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474 (1921); *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 (1940). See Sutherland, *Statutory Construction* (3d Ed., 1943) § 5005.

A committee report was described as "the most authoritative legislative gloss", in *National Labor Rel. Bd.* v. *Lion Oil Co.*, 352 U. S. 282, 292 (1957).

The Court of Appeals referred to the legislative history (p. 43, *infra*), but stated that Congress' adoption of the amendment simply recognized the soundness of defendant's position saying:

> "Nothing was accomplished other than to make certain that which previously had been a matter for statutory interpretation." (p. 43, *infra*)

In construing this amendent, the Court of Appeals has rejected the views of the Congressional Committees, that they were granting the right to a deduction which had not previously existed.

The same argument which Continental made here was rejected, in reference to another clause of the same statute, in *Federal Deposit Ins. Corp.* v. *Irving Trust Co.*, 137 F. Supp. 145 (S.D.N.Y., 1955). The case involved assessments on cash collateral accounts, which the F.D.I.C. had treated as assessable under the 1935 Act and which were excluded from the assessment base by the 1950 Act. Judge McGohey cited the same Senate Committee report on which we rely, in support of his holding that the 1950 Act was intended to make changes, and not merely to clarify or interpret the earlier statute (137 F. Supp at 159).

The defendant banks in the *Irving Trust Co.* case accepted the decision without appeal, but the Courts below have adopted a different view of the statute. The importance of the question to F.D.I.C. requires that the issue be settled by this Court.

II.

The double deduction for certain uncollected cash items should be reviewed.

The decision of the Court below, permitting deduction of twice the amount of uncollected cash items which were not received and forwarded on the base day, touches matters of great importance to F.D.I.C. The uncollected cash items may be put into two categories for purposes of this petition, namely, (1) items forwarded on the base day, but disallowed by F.D.I.C. because they had not been received on the base day, and (2) items which were forwarded either prior to the base day (by week-end processing) or after the base day.

The decision below, allowing double deduction for all such items:

(a) departs from prior decisions of this Court concerning the authority of an administrative agency to make regulations; and

(b) holds that amendment of a regulation proves the unreasonableness of the original regulation, a doctrinaire answer to a problem which this Court has not yet settled.

One underlying error should first be mentioned.

The Court of Appeals seems to have given no heed to the fact that method (aa) under the statute authorized certain uncollected cash items to be *multiplied by two,* in return for not being permitted to deduct all uncollected items. It adopted Continental's argument that failure to grant

the deduction was to penalize efficiency, inasmuch as the items could have been deducted (multiplied by two) if they had been held for forwarding on Monday (p. 48, *infra*). This overlooks the real purpose of week-end processing of cash items, namely, to expedite their collection. This purpose was so effectively served that substantial amounts of items forwarded during the week-end were actually collected on the following Monday (J. A. 6, 91). Continental finally paid the assessment on items so collected, after the trial began (J. A. 60). But items not yet collected on Monday had also been expedited.

It was no more justifiable to deduct twice the amount on Monday of items forwarded on preceding days than it would be on a Tuesday to deduct twice the amount of items forwarded on Monday.

(a) The Court's restriction on F.D.I.C.'s power to make regulations should be reviewed.

A single calculation will show how costly it may prove to invalidate the F.D.I.C.'s requirement that items for which double deduction is claimed must have been received on the base day. This regulation applies to every day in the week, and not simply to Mondays. A double deduction at the rate of 1/12th% per annum for a six-month period is equivalent to 1/12th% of the amount of each item. If items received on a Thursday (as an example) are held over to be forwarded on a Friday base day, the 1/12% deduction that is received for one day's deferment of the availability of the money represents a return at the rate of 30% per annum on the amounts involved. The regulation was a means of guarding against such an unintended bonanza for insured banks. The invalidation of the regulation creates a loophole which may tempt banks to delay the processing of items received shortly prior to any base day.

The Court, which admitted that its members "are far from experts in the refinements of the banking business" (p. 42, *infra*), should not have interfered with regulations which F.D.I.C. adopted to deal with the refinements of the banking business.

The 1950 statute permits double deduction of uncollected cash items "forwarded for collection on the assessment base days", without expressly requiring that they be received on the base day (12 U.S.C. § 1817(a)(1)(iii)(aa); p. 34, *infra*). This statute granted F.D.I.C. both specific and general power to adopt regulations. Section 1817(a)(1)(iii) authorized it to "define the terms 'cash items', 'process of collection', and 'uncollected items' and * * * fix the maximum period for which any such item may be deducted" (p. 35, *infra*). In addition, Section 1819, Tenth gave F.D.I.C. power to prescribe "such rules and regulations as it may deem necessary to carry out the provisions of this chapter" (p. 36, *infra*).

The regulations adopted under this authority are printed in the Joint Appendix (J. A. 175-204).

Regulation 327.2 provides that items used as a basis for double deduction must be both *received* and forwarded on the base day (J. A. 177, 183). The requirement is logically inherent in the statute itself, as a basic distinction between the single deduction allowed under the (bb) method and the double deduction allowed under the (aa) method. The regulation was entitled "327.2. Period of deduction for uncollected cash items", and in fact fixed a maximum period for deduction, by forbidding banks to obtain extra deductions for items whose presentation they themselves delayed.

This regulation was first published in the Federal Register as a proposal, with formal notice of rule-making (15 F. R. 7724, J. A. 175). Subsequently the regulation was adopted, and published in full in the Federal Register on December 6, 1950 (15 F. R. 8628; J. A. 179, 182-83). The Instruction Sheet furnished to all insured banks in De-

cember 1950 (J. A. 74) stated that deduction of cash items would be allowed only for those forwarded for collection on the assessment base day which were *received* on said days (Pl. Ex. 3; J. A. 144). Although certain of the 1950 regulations were amended in 1954 after F.D.I.C.'s conference with the American Bankers Association's Committee on Assessments (J. A. 85), the 1954 revision continued the requirement that cash items be received and forwarded on the base day (J. A. 188, 197).

This Court has held that a regulation adopted contemporaneously with the passage of a statute, by the agency charged with its supervision, has the same force as though prescribed in terms by statute.

> *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349 (1920).

The Court of Appeals did not apply the standard which this Court in *Fawcus Machine Co.* v. *United States*, 282 U. S. 375 (1931) held applicable to administrative regulations:

> "They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons." (p. 378)

See also *McLaren* v. *Fleischer*, 256 U. S. 477, 481 (1921); *Lucas* v. *American Code Co., Inc.*, 280 U. S. 445, 449 (1930); *United States* v. *Bergh*, 352 U. S. 40, 46-47 (1956).

In fact, the Seventh Circuit decision below is in conflict with the principle of the decision by the Eighth Circuit Court of Appeals that:

> "the burden is upon those who attack an administrative regulation (when power to make regulations is given by Congress) to make its invalidity so manifest that the court has no choice except to hold the regu-

lation inappropriate to the end specified in the Act of Congress." *Knight* v. *Mantel*, 135 F. 2d 514, 517 (1943).

Under these standards it was also reasonable for F.D.I.C. to treat the base day as excluding prior days, whether they were week-days or week-ends.

Generally, a day means a calendar day of 24 hours, running from midnight to midnight.

Rock Finance Co. v. *Central National Bank*, 339 Ill. App. 319, 89 N. E. 2d 828, 832 (1950);
Kirkpatrick v. *King*, 228 Ind. 236, 91 N. E. 2d 785, 789 (1950);
American Nat. Bank v. *Service Life Ins. Co.*, 120 F. 2d 579, 581 (7th Cir., 1941).

Words can properly be given their ordinary meaning.

Crane v. *Commissioner*, 331 U. S. 1, 6 (1947).

The Court of Appeals also referred to a provision on Continental's deposit slips that the deposit was conditional, and might be treated as received on the succeeding business day (p. 45, *infra*). The text of this stipulation was: "All items received for deposit or collection after regular banking hours *may be deemed* for all purposes to have been received for deposit or collection by the Bank as of the succeeding business day, although the Bank, in its discretion, *may handle the items* or put through the credit *on the same day* the deposit is received" (Reverse side of Ex. C to Stip., not printed in the Joint Appendix). The opinion below did not discuss the inconsistency between handling the items over the week-end and still asserting that they were received "for all purposes" (including the claim of double deduction) on the succeeding Monday. It seems clear that Continental could not properly handle the deposited items and forward them on Friday or Saturday, and still assert for deposit assessment purposes that they were not received until Monday.

In denying effect to the regulations described above, the Court of Appeals was clearly inconsistent with applicable decisions of this Court.

(b) This Court should review the holding that F.D.I.C.'s 1954 regulation was retroactive.

In 1954, F.D.I.C. adopted new regulations, which defined "base day" as covering the period from the closing of the books on the last preceding business day to the closing of the books on the base day, and expressly including intervening holidays and non-business days. These new regulations were published with notice of rule-making, and subsequently adopted (19 F. R. 1019; J. A. 184; 19 F. R. 1663; J. A. 193).

The Court of Appeals treated this 1954 regulation as "recognition" by F.D.I.C. that its prior practice constituted an "unreasonable limitation" on the meaning of the statute (p. 48, *infra*). In effect, it held that amendment of a regulation is a confession of prior error.

As already mentioned (p. 9, *supra*), F.D.I.C. informed the representatives of the American Bankers Association that its 1954 amendments to the regulations would not be retroactive. The regulation of 1954 as published, stated that it applied to assessment base days commencing March 31, 1954 (J. A. 193 *et seq.*). Mr. Anderson of F.D.I.C. stated that "it would be chaotic to change it for the past with respect to some 13,000 banks" (J. A. 86). The Court below has created chaos or gross inequity, or both, by making the 1954 regulations applicable retroactively to Continental, after all other banks have paid assessments under the terms of the 1950 regulations.

In support of its view, the Court of Appeals (pp. 48-49, *infra*) quoted from this Court's opinion in *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, 135 (1936) that:

> "Since the original regulation could not be applied, the amended regulation in effect became the primary

and controlling rule in respect of the situation presented."

The *Manhattan General Equipment* case should not control the facts here presented. The original regulation in that case would have been inconsistent with the statute and unreasonable as applied to the facts in the case (297 U. S. at 135). In the present case, there is no reason why the 1950 regulation "could not be applied". It had been applied to all banks but Continental, and it was a sensible construction of and consistent with the statute.

In the 1954 regulation, F.D.I.C. was stretching the meaning of "base day" to cover a three-day week-end, and thereby giving banks an additional benefit. By this time the experience under the 1950 statute had shown that the insurance fund could afford to permit such leniency. But the 1954 regulation should be recognized as an exercise of leniency. If one of the two regulations must fall as inconsistent with the statute, it should be the 1954 one rather than the 1950 one. In reaching the opposite result, the Court of Appeals not only rejected a justifiable administrative interpretation, but violated the general principle against making either a statute or a regulation retroactive.

In rejecting the regulation requiring that items claimed for double deduction be received on the base day, the Court held that the "literal language of the statute" must govern (p. 46, *infra*). But the 1954 regulation expanding the meaning of base day clearly went beyond the "literal language of the statute". The Court was guilty of extreme inconsistency in invalidating the first regulation and sustaining the latter. Moreover, in applying the 1954 regulation retroactively, the Court, in effect, amended the statute by a regulation which expressly stated that it was not to apply to the prior period.

The presumption against retroactive application was expressed by this Court in *Miller* v. *United States*, 294 U. S. 435, 439 (1935):

"The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears * * *. An administrative regulation is subject to the rule equally with a statute;"

See also Rutledge, J. dissenting, in *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 640-41 (1944).

The power of administrative agencies to alter or amend their regulations, and the effect of such amendments, is an area which has been seldom presented to this Court. This Court has upheld an agency's power to change prospectively interpretations it has previously promulgated.

Helvering v. *Wilshire Oil Co.*, 308 U. S. 90, 100 (1939).

Lower Federal courts have questioned the power to make an amendment retroactive.

Lesavoy Foundation v. *Commissioner*, 238 F. 2d 589, 593-94 (3rd Cir., 1956);
See Von Baur, *Federal Administrative Law* (1942) § 493;
Cf. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 413-15 (1941).

This Court has not heretofore dealt with the problem of whether amendments of administrative regulations should be given other than prospective application.

In this same regulation there is a provision which excludes from the deduction of cash items checks received for the sale of assets (§ 327.1(b) J. A. 195). This part of the regulation takes away a privilege which banks previously enjoyed. If applied retroactively it would require payment of assessments on a substantial volume of items previously excluded from deposits. But Continental does not claim that this part of the regulation should be retroactive. It argues that those parts of the regulation that are beneficial should be given retroactive effect but those

parts that are detrimental should be prospective only. Such an argument is fallacious. The regulation is an entire one. It was adopted at one time in conformance with the rule making power. It deals with the same subject matter. It should therefore be either wholly prospective or wholly retroactive.

In this single case, the assessments involved for one bank on a retroactive application of the 1954 regulation total about $65,000. If the same ratio exists in other insured banks, whose deposits totaled $193 billion at the end of 1954 (F.D.I.C. Ann. Rep., 1954, p. 139), the retroactive application of the regulation may involve refund claims running into millions of dollars. F.D.I.C. did not intend to impose such a burden on itself, and should not be subjected to that risk by a court's retroactive application of a regulation that F.D.I.C. expressly stated was not retroactive.

III.

The exclusion of dealer reserves from deposits should be reviewed.

The Court of Appeals' refusal to treat "dealer reserves" as assessable deposits involves a decision of another important Federal question which has not been decided by this Court and on which lower Federal courts are in conflict.

The facts concerning this item have already been set forth (*supra*, pp. 9-10).

F.D.I.C. has always considered that the definition of "deposit" in the 1935 Act, repeated verbatim in the 1950 Act, is broad enough to include all sums which a bank holds in any account for a customer. The statute defines a deposit as "the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account" (12 U.S.C. § 264(c)(12), 1935 Act; 12 U.S.C. § 1813(l), 1950 Act).

The Court of Appeals gave three reasons for refusing to treat the account as a deposit: (a) that the account was only a conditional credit, (b) that the contract which the bank purchased was not "money or its equivalent", and (c) that the account was not a "commercial" account, because it could not be used in commerce except under the restriction imposed by the contract.

We believe that all these reasons are unsound.

(a) The idea that only unconditional credits to a customer's account should be included within the definition of deposits was rejected by Congress in 1935. The original draft of the bill included the word "unconditional" in the definition of deposits, but it was stricken from the bill as passed by the Congress. The original bill (H. R. 7617, 74th Cong., Sec. (c)(12); see H. Rep. No. 742) read:

> "The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give *unconditional* credit to a commercial, checking, savings, time or thrift account, * * *." (Compare 12 U.S.C.A., 264 (c)(12)).

(b) The agreement provided in effect that the contracts were purchased at par, and that the bank would "deposit" the 10% reserve in a special account for the customer (J. A. 22).

The relationship created by the agreement and the credit to the "Contract Reserve" account is no different from that existing between a bank and a customer when any deposit is made. Instead of defendant paying the full purchase price of the commercial paper in cash to the customer and having the customer redeposit 10% of it with the bank, the same result was attained by retention of 10% of the purchase price by defendant and by a *credit* for and deposit of that amount to the customer (J. A. 22). Cf. *Davis* v. *McNair*, 48 F. (2d) 494, 496 (5th Cir., 1931).

In many instances when a bank makes a loan or discounts commercial paper it insists on the customer main-

taining a substantial sum on deposit. The resulting accounts give rise to deposits, which F.D.I.C. has always treated as the "equivalent" of money and assessable. This, the first decision to the contrary, opens the possibility of dispute concerning many items beside dealer reserves unless it is corrected.

(c) The account grew out of the commercial business of the bank. F.D.I.C. was reasonably justified in treating it as a "commercial" account. The Court's failure so to treat it constitutes another example of departure from general rules of administrative regulatory power.

On all these counts the decision of the Court of Appeals is squarely contrary to the decision of the District Court for the Eastern District of Missouri in *Industrial Bank of St. Louis* v. *Federal Deposit Ins. Corp.*, 93 F. Supp. 916, 918 (1954). That case held that "dealer reserves" were assessable as deposits. Those accounts, too, arose out of the purchase of installment paper and were not subject to withdrawal until the installment paper was paid in full.

The Court of Appeals' decision is also inconsistent with *Federal Deposit Ins. Corp.* v. *Irving Trust Co.*, 137 F. Supp. 145 (S.D.N.Y. 1955). The *Irving Trust Co.* case held cash collateral to be assessable even though the right to withdrawal was restricted, rejecting the narrow definition of deposits which was adopted by the Court of Appeals here.

The Court of Appeals' decision is also inconsistent with its own position in this case when it correctly held that money withheld by defendant for salaries and wages of its employees for payment of taxes and Government securities for employees were the equivalent of cash and that the situation was the same as though the amounts withheld had been paid to employees and returned by them to the bank to be used for the purposes indicated. Here the defendant, instead of paying the balance of the purchase price of the instalment paper to the customer to be

returned by him and placed in an account to his credit, placed such balance to his credit.

The fact that the account was not subject to withdrawal by check does not destroy its character as a deposit. In *Fidelity Bank and Trust Co.* v. *Eli-Walker Dry Goods Co.*, 77 S. W. (2d) 480, 483 (Mo. 1934) the Court said:

> "* * * It is true that such fixed deposit was not subject to be checked against without the bank's consent, *but such fact is of no great significance* since it is well understood that deposits may be general, although not carried in a checking account."

The dealer reserve item is in issue through the period ending June 30, 1950. Thereafter, the 1950 amendment to the Federal Deposit Insurance Act permitted banks to exclude from the assessment base "cash funds which are received and held solely for the purpose of securing a liability to the bank *but not in an amount in excess of such liability*" (12 U.S.C.A. § 1817(a)(2)(ii)).

The fact that the exclusion was limited to the amount owed to the bank conclusively shows that cash collateral accounts are in law deposits.

The exemption from paying assessment deposits on cash collateral such as dealer reserves was granted as a special exclusion from the assessment base (see text of amendment at p. 35, *infra*). The report of the House Committee on Banking and Currency shows that Congress recognized cash collateral as having been assessable prior to 1950 and intended to create a new exclusion for the benefit of the banks "in addition" to existing deductions (Pl. Ex. 2, J. A. 142; H. R. Rep. 2564, 81st Cong., 2d Sess).

The decision below has an importance, however, which goes beyond the period covered by the 1935 Act. The Court of Appeals has held that dealer reserves are not deposits at all. In so doing it has adopted a permanent limitation on the statutory definition of "deposit", by

holding that deposits must be unconditional, that commercial paper purchased by a bank is "money or its equivalent" only to the extent of amounts immediately paid out in cash and not to the extent of any balance which by agreement is placed to an account to the credit of the customer, and by holding that such an account which arises out of a commercial transaction with the bank is not a "commercial account". The holding has created serious problems for F.D.I.C., which ought to be settled by this Court.

CONCLUSION

A writ of certiorari should be issued to review the judgment of the Court of Appeals for the Seventh Circuit.

Dated: September 17, 1957.

Respectfully submitted,

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APPENDIX I

Statutes Involved

1935 Federal Deposit Insurance Act, 12 U.S.C., Sect. 264:

"(c) As used in this section—

• • •

"(12) The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the board of directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage; • • •

"(13) The term 'insured deposit' means the net amount due to any deposit or deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of $5,000. • • •

• • •

"(h) (1) The assessment rate shall be one-twelfth of 1 percentum per annum. The semiannual assessment for each insured bank shall be in the amount of the product of one-half the annual assessment rate multiplied by an assessment base which shall be the average for six months of the differences at the end of each calendar day between the total amount of liability of the bank for deposits (according to the definition of the term 'deposit' in and pursuant to paragraph (12) of subsection (c) of this section, without any deduction for indebtedness of depositors) and

the total of such uncollected items as are included in such deposits and credited subject to final payment: ***Provided, however,*** That the daily total of such uncollected items shall be determined according to regulations prescribed by the board of directors upon a consideration of the factors of general usage and ordinary time of availability, and for the purposes of such deduction no item shall be regarded as uncollected for longer periods than those prescribed by such regulations: * * *"

1950 Federal Deposit Insurance Act, 12 U.S.C.

"§ 1813. Definitions

"As used in this chapter—

* * *

"(l) The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the Board of Directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage: * * *

"(m) The term 'insured deposit' means the net amount due to any depositor for deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of $10,000. * * *

• • •

"(p) The term 'trust funds' means funds held by an insured bank in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent."

• • •

"§ 1817. Assessments—Rate and amount; base, deductions; form and contents of certified statements.

"(a) The assessment rate shall be one-twelfth of 1 percentum per annum. The semiannual assessment for each insured bank shall be in the amount of the product of one-half the annual assessment rate multiplied by the assessment base. The assessment base shall be the amount of the liability of the bank for deposits, according to the definition of the term 'deposit' in and pursuant to subsection (1) of section 1813 of this title, without any deduction for indebtedness of depositors: *Provided*, That the bank—

"(1) may deduct (i) from the deposit balance due to an insured bank the deposit balance due from such insured bank (other than trust funds deposited by it in such bank) which is subject to immediate withdrawal; (ii) trust funds held by the bank in a fiduciary capacity and which are deposited in another insured bank; and (iii) cash items as determined by either of the following methods, at the option of the bank; (aa) By multiplying by 2 the total of the cash items forwarded for collection on the assessment base days (being the days on which the average deposits are

computed) and cash items held for clearings at the close of business on said days, which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts; or (bb) by deducting the total of cash items forwarded for collection on the assessment base days and cash items held for clearings at the close of business on said days, which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts, plus such uncollected items paid or credited on preceding days which are in the process of collection: *Provided,* That the Board of Directors may define the terms 'cash items', 'process of collection', and 'uncollected items' and shall fix the maximum period for which any such item may be deducted; and

"(2) may exclude from its assessment base (i) drafts drawn by it on deposit accounts in other banks which are issued in the regular course of business; and the amount of any advices or authorizations, issued by it for cash letters received, directing that its deposit account in the sending bank be charged with the amount thereof; and (ii) cash funds which are received and held solely for the purpose of securing a liability to the bank but not in an amount in excess of such liability, and which are not subject to withdrawal by the obligor and are carried in a special non-interest-bearing account designated to properly show their purpose.

"Each insured bank, as a condition to the right to make any such deduction or exclusion in determining its assessment base, shall maintain such records as will readily permit verification of the correctness thereof. The semiannual assessment base for one semiannual period shall be the average of the assess-

ment base of the bank as of the close of business on March 31 and June 30, and the semiannual assessment base for the other semiannual period shall be the average of the assessment base of the bank as of the close of business on September 30 and December 31; *Provided,* That when any of said days is a nonbusiness day or a legal holiday, either National or State, the preceding business day shall be used. The certified statements required to be filed with the Corporation under subsections (b) and (c) of this section shall be in such form and set forth such supporting information as the Board of Directors shall prescribe. The assessment payments required from insured banks under subsections (b) and (c) of this section shall be made in such manner and at such time or times as the Board of Directors shall prescribe, provided the time or times so prescribed shall not be later than sixty days after filing the certified statement setting forth the amount of assessment."

* * *

"§ 1819. Incorporation; powers; seal

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

* * *

"Tenth: To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter."

APPENDIX II

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 11933-4 OCTOBER TERM, 1956, APRIL SESSION, 1957

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellant,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellee.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellant.

} Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

June 25, 1957

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

MAJOR, *Circuit Judge.* Plaintiff, Federal Deposit Insurance Corporation (sometimes referred to as FDIC), is a

corporation duly organized and existing under and by virtue of an Act of Congress of the United States as amended by the Act of August 23, 1935 (Title 12 U.S.C.A. Sec. 264) and again by the Act of September 21, 1950 (Title 12 U.S.C.A. Sec. 1811), designated as the Federal Deposit Insurance Act. Defendant, Continental Illinois National Bank and Trust Company of Chicago (sometimes referred to as Continental), is a duly chartered and organized national banking association with its principal place of business in the City of Chicago, Illinois, and at all times pertinent to the instant suit was an insured member bank as defined by Title 12 U.S.C.A. Sec. 1813.

The present action was instituted to recover assessments, for the period from July 1, 1948 through June 30, 1953, alleged to be due from defendant under the statutes relating to federal deposit insurance. Numerous items were placed in issue by the pleadings, all but four of which were settled by agreement of the parties. On these a trial was had by the court upon a party stipulation, together with documentary and oral testimony. The court, in conformity with its findings and conclusions, entered judgment in favor of plaintiff on two of such items and in favor of defendant on the remaining items. Each of the parties appeals from that portion of the judgment adverse to it.

An insured bank is, under the Act, made liable for assessments, the base for which is its deposits, as the latter term is defined and contemplated by the Act. All the items in dispute involve the treatment to be accorded certain alleged deposits, that is, whether they constitute a portion of the base for assessment purposes.

The four items, giving rise to as many contested issues, are as follows:

1. Whether in case of reciprocal deposit accounts with other banks defendant's liability for assessments

under the Federal Deposit Insurance Act of 1935 is measured by the gross or net balance of the accounts.

2. Whether under the Federal Deposit Insurance Act of 1950 defendant was entitled to deduct from the amount of its total deposits the amount of various uncollected cash items in process of collection on the "base day." This item includes government bonds, cashed by defendant on the assessment date but neither collected nor credited to deposit accounts on that date.

3. Whether the amounts of credits arising under the so-called "contract reserve" account constituted deposits under the Federal Deposit Insurance Act of 1935.

4. Whether the amounts of payroll deductions and taxes deducted by defendant from its employees' salaries constituted trust funds or deposits within the meaning of the 1935 and 1950 Acts.

In the district court issues 1 and 2 were decided adversely to plaintiff, while 3 and 4 were decided adversely to defendant. We shall discuss these issues in the order of their enumeration.

CONTESTED ISSUE 1

Reciprocal accounts exist where two banks maintain deposit accounts with each other. Such accounts are termed "due to" and "due from" accounts. Defendant maintained reciprocal bank accounts with 26 large banks in 9 principal cities throughout the country. It is defendant's position that only the net amount, if any, due another bank constituted the measure of deposit liability and became a part of the assessment base. In contrast, plaintiff contends that the deposit of another bank in Continental is to be

accorded the same treatment as any other deposit and that the gross amount of the deposit is the assessment base, irrespective of the amount of Continental's deposit in such other bank.

The stipulation contains an illustration of the method Continental followed in handling reciprocal bank balances in computing its assessment base, as follows: "If bank 'A' had a deposit account in Continental of $250.00 and Continental had a deposit balance in bank 'A' of $100.00, Continental would include only the difference in its deposit liabilities for assessment purposes, namely $150.00. If the conditions were reversed and bank 'A' had a deposit balance in Continental of $125.00 and Continental had a deposit balance in bank 'A' of $300.00 Continental would not include any of the deposit due to bank 'A' in its deposit liabilities for assessment purposes."

The relevant portion of the 1935 Act as it pertains to the issue under discussion is contained in Sec. 264 (h)(1), which provides among other things that the assessment base shall be determined by the "* * * amount of liability of the bank for deposits (according to the definition of the term 'deposit' in and pursuant to paragraph (12) of subsection (c) of the section, without any deduction for indebtedness of depositors)." The last named subsection states: "The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account * * *, together with such other obligations of a bank as the board of directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage * * *."

This appears to be an appropriate point to take note also of the 1950 Act, even though the issue is for decision

under the terms of the 1935 Act. Title 12 U.S.C.A. Sec. 1817 (a) contains, so far as it relates to the point under discussion, substantially the same language as that contained in the 1935 Act, with the following proviso: "Provided, That the bank (1) may deduct (i) from the deposit balance due to an insured bank the deposit balance due from such insured bank * * *." Plaintiff makes much of the point that Congress by this proviso amended the law so as to allow a deduction not theretofore permitted by the 1935 Act. Otherwise, so it is suggested, there would have been no purpose on the part of Congress in adopting the proviso. The district judge rejected this reasoning and stated in a memorandum opinion "that the pertinent provisions of the 1950 statute merely clarified the previous statute."

No other court has decided the issue under discussion, so far as we are aware. The issue, therefore, must be determined from the statutory language, together with such aids to construction as may be available. It appears plain that the assessment base is the deposit liability of the bank but that this does not encompass all of a bank's accounts even though labeled as deposits. It is the ordinary and usual deposits of a bank which measure its strength, its growth and development. The principal earnings are derived from its investment of such deposits. If a bank lends to a depositor, it receives interest on such indebtedness the same as though the deposit had been otherwise invested. In contrast, reciprocal deposits are for the convenience of the banks involved and their customers. They add nothing to the earnings of either bank except the bank which holds a net balance. If all the loanable assets of a bank were deposited in reciprocal accounts, it could not long survive.

Congress defined a deposit as the money received by a bank in the "usual course of business." Reciprocal deposits, in our view, are not thus received. This view is

fortified by the fact that out of a total of 13,600 insured banks in the country, not more than three to four hundred carried reciprocal accounts. In other words, out of all in-insured banks fewer than 3% maintained the character of deposits with which we are now concerned.

Using the stipulated illustration heretofore noted, was the deposit liability of Continental to bank "A" $250.00, the amount of "A's" deposit with Continental, or was it $150.00, the difference between the amount of Continental's deposit with bank "A" and the latter's deposit of $250.00 with Continental? While we are far from experts in the refinements of the banking business, it borders on the fictional, so we think, to assert that Continental's deposit liability was more than $150.00, the difference between the two deposits. If "A" had $15.00 in his pocket which belonged to "B", and "B" $10.00 in his pocket which belonged to "A", the latter's liability to "B" would be $5.00 rather than $15.00. Any other conclusion would ignore the realities of the situation, including the actual relationship existing between the parties.

As might be expected, plaintiff places much reliance upon the language contained in Sec. 264 (h)(1) which provides that deposits shall be included in the assessment base "without any deduction for indebtedness of depositors." Obviously, this language is of no benefit to plaintiff if the term "deposit" is accorded its usual and ordinary meaning. Moreover, in the illustration used, bank "A" had no indebtedness to Continental; the latter was indebted to bank "A" in the amount of $150.00. This amount Continental agrees would have been includible in its base for assessment purposes.

Plaintiff relies upon its administrative interpretation of the statute, consistent with the position which it now takes. Defendant, however, has at no time acquiesced in such

interpretation; in fact, it has consistently from the beginning urged the position which it now takes. In the view which we take of the purpose and intendment of the statute, we are not impressed with plaintiff's interpretative ruling.

Plaintiff has a more plausible argument based upon the 1950 amendment which, as heretofore shown, expressly provided for the exclusion of a reciprocal deposit in another bank. Our attention is called to the legislative history relative to this amendment which indicates that Congress regarded the proviso as an amendment rather than as an interpretation of the previous statute. The district court expressed the view that the 1950 amendment was merely a clarification of the previous statute. We think it not of controlling importance whether the latter Act be treated as an amendment or a clarification. The fact is that a controversy existed between plaintiff and defendant (as well as other banks) relative to the issue under consideration, and to resolve such controversy Congress added the proviso. By such action Congress recognized the soundness of defendant's position. However the proviso be characterized, the doubt theretofore existing was resolved. Nothing was accomplished other than to make certain that which previously had been a matter for statutory interpretation.

More important is the treatment accorded reciprocal bank balances by other federal agencies. The Federal Reserve Bank, like plaintiff, was an agency of the Federal Reserve System. The Federal Reserve Bank instructed its members carrying reciprocal accounts to report only the net balances of such accounts. The Comptroller of the Currency also called for a report of only the net balances of reciprocal deposits. We think, contrary to plaintiff's contention, that this evidence was properly admitted. Cer-

tainly it shows a recognition by these agencies of the actual relationship existing between banks with reciprocal accounts. More than that, the rulings are consistent with and lend support to the view that such deposits are not received in the "usual course of business," and that the bank receiving such deposits incurs liability only to the extent of the net balances of such deposits. We agree with the holding of the district court on this issue.

CONTESTED ISSUE 2

This issue relates to cash items, that is, checks, drafts and other instruments providing for the payment of money which a reporting bank received in the regular course of business and paid or credited conditionally to a deposit account. These items are called "float" and, in a bank the size of defendant, many thousands are handled each day. The period involved is from 1950 to 1954.

The 1935 Act provided for an assessment base consisting of the average daily deposits at the end of each calendar day for six months, deducting, however, "the total of such uncollected items as are included in such deposits and credited subject to final payment." The 1950 Act changed the assessment provision so as to simplify the work of the banks incident to the ascertainment of the average deposit liability during the semiannual periods. There were designated as base days March 31 and June 30 for the first and September 30 and December 31 for the second semiannual period. Two methods were provided for computing the amount of such deposits, that is, the (aa) method and the (bb) method. Defendant utilized the former, which provides that the reporting bank may deduct cash items as determined "by multiplying by 2 the total of the cash items forwarded for collection on the

assessment base days (being the days on which the average deposits are computed) and cash items held for clearings at the close of business on said days, which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts." (Sec. 1817 of the 1950 Act.)

The items here involved are only those "forwarded for collection." Plaintiff in its brief classifies such items as follows:

> "1. Cash items received and forwarded prior to the base day.
>
> 2. Cash items received prior to the base day and forwarded on the base day.
>
> 3. Cash items received on the base day and forwarded on the following day."

The items in class 1 were received after the close of business on a Friday and forwarded for collection on Saturday or Sunday preceding Monday, a base day, but remained uncollected on that day. The items in class 2 were received in the interim between the closing of the bank on Friday and the opening of the bank on Monday, but not forwarded for collection until the latter day. The items in class 3 were received on Monday but not completely processed and forwarded until the following day. All of the items in the three classes were conditionally credited on Monday, the base day.

Upon receipt of a "float" deposit, the bank issued a slip which provided in effect that the deposit was conditional, with the right reserved to refuse to honor or pay checks drawn against such deposit. It was also provided that items received for collection after regular banking hours might be treated by the bank as a deposit or collection of the succeeding business day.

The class 2 items are clearly deductible. They were forwarded for collection on base days and are in compliance with the literal language of the statute. Plaintiff in its brief states:

> "The items in this category meet the requirement of the statute of being forwarded for collection on the assessment base day, but they do not meet the requirement of the regulation that they must have been received on the base day. We must, therefore, consider whether the regulation is consistent with the statute."

Plaintiff makes the feeble argument that a regulation promulgated in 1950 required that the items be both received and forwarded on base days. This regulation, insofar as it required receipt of such items on base days, is in effect an amendment of the statute, it is inconsistent therewith and in that respect is void.

Class 1 and class 3 items present a more difficult problem. As noted, the former includes items both received and forwarded on Saturday or Sunday preceding a base day but which remained uncollected on the base day and for which the depositor had not previously received credit. Class 3 items were received on the base day but not processed and forwarded until the following day. The depositor, as to this class of items, received only a conditional credit on the base day.

The controversy as to class 1 and class 3 items depends upon an interpretation of the term "base days" as employed in the statute. Plaintiff made no attempt to interpret or define "base days" until it promulgated a regulation in 1954, entitled "Periods of Deductions for Uncollected Items." (Sec. 327.1 (a) of the 1954 Regulations.) The regulation provided:

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> **"The term 'base day' shall be the period of time beginning with the time of the closing of the books of the bank on the last business day immediately preceding the assessment base day to the time of the closing of the books of the bank on the base day according to the normal practice of the bank. Holidays and other nonbusiness days intervening between the preceding business day and the base day are a part of the base day."**

Paragraph (f) of the same section of the regulation provided:

> **"A cash item shall be deemed to have been forwarded for collection on the base day if it has been received for collection on the base day and has been either forwarded for collection on that day or is in the process of forwarding in accordance with the normal procedure of the bank, even though the item may be in the possession of the bank at the time of the closing of the books on the base day."**

It is plain that class 1 items are now deductible under paragraph (a) and that class 3 items are now deductible under paragraph (f) of the regulation. This much appears to be conceded because plaintiff's suit covers only the period between the amendment of the Act in 1950 and the promulgation of the 1954 regulation.

Plaintiff contends that the term "base day" as used in the statute should be interpreted to mean a calendar day, that is, the time from one midnight until the next. Any merit in this contention appears to be dissipated from the fact that plaintiff in 1954 defined "base days" in the manner above shown without any change by Congress in the statutory language. If a base day meant a calendar day in 1950, it must have meant the same in 1954. If it en-

compassed only a calendar day when the amendment was enacted, we think a serious question would be raised as to the validity of the 1954 regulation which defined a base day as including Saturdays and Sundays prior thereto, as well as the day following as to certain designated items.

In any event, the 1954 regulation constitutes a recognition on the part of plaintiff of the unreasonable limitation which it would have us place upon the meaning of "base day" as used in the statute. The situation before us is an apt illustration. If defendant had permitted the accumulation of all cash items between the time it closed its bank for business purposes on Friday until it opened on Monday (a base day) and had forwarded such items on that day, there could be no question as to their deductibility. To hold that they are not deductible because the bank, in keeping with efficiency and sound banking practices, maintained a force for the purpose of forwarding such items on Saturday and Sunday, is barren of any logic, as plaintiff's 1954 regulation appears to recognize.

Much is said as to whether the 1954 regulation should be applied retroactively so as to cover the items in issue. Defendant argues in the affirmative, plaintiff in the negative. We think this issue need not be resolved. If plaintiff had the authority in 1954 to interpret the statute as it did, we think a court has the authority to place a like interpretation upon the statute during the period from 1950 to 1954. In *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, it was contended that an amended regulation was void because it was retroactive. The court rejected the contention, but in doing so made the following pertinent observation (page 135):

> "Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation pre-

sented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute."

Included in contested issue 2 are government bonds cashed on base days and held by defendant for collection at the close of such days. It is urged that such bonds are not "cash items," and that a distinction should be drawn between them and checks and bank drafts. We are not impressed with this argument. In our view, all the items included in contested issue 2 were deductible.

CONTESTED ISSUE 3

A brief statement of the facts will suffice to bring into focus the issue for decision. In financing installment paper defendant purchased sales contracts from a customer (a dealer engaged in selling retail merchandise on credit to a person sometimes called the buyer), without recourse, under an agreement which provided for remittance to the customer of 90% of the amounts owing under such contracts (less 1/8 of 1% cash discount), and crediting the remaining 10% to an account set up on defendant's books and designated as the customer's "Contract Reserve." The agreement referred to the "Contract Reserve" as a deposit credited to the customer to be used in accordance with the terms of the agreement. In brief, the "Contract Reserve" account was utilized as a means of securing the defendant for the balance due on the sales contract made between the buyer and the dealer and sold and assigned by the latter to defendant. The agreement between the customer (dealer) and the bank provided that the reserve account should be maintained at a specified level. When below that level, the difference was to be made up by the customer; when above the level, and then only, the cus-

tomer was entitled to draw on the account. In practice, only credit was extended to the buyer, no withdrawal was permitted.

As relating to the question for decision, it can be stated that the sole purpose of the arrangement between the customer and the bank was to secure the latter and this was accomplished by withholding 10% of the contract purchase price. If the buyer satisfied his obligation, the 10% belonged to the customer. If, however, there was a default in payment by the buyer, the bank could utilize the reserve account to the extent necessary to prevent any loss on its part.

The asserted liability is for a period prior to 1950, when the Act was amended in a manner which apparently provided that the alleged deposits under discussion are excludible from the tax base. The question, therefore, must be decided under the 1935 Act.

The district court decided this issue adversely to defendant. In our view, this was error, notwithstanding there is some authority, to which we shall subsequently refer, which furnishes support for plaintiff's position. In connection with our discussion, under contested issue 1 we have set forth the statutory definition of an assessment base as being the "* * * amount of liability of the bank for deposits," as well as the definition of the term "deposit."

Plaintiff in its brief under the present issue has set forth the statutory definition of "deposit" by breaking it down into separate phrases which we think pertinent even though it amounts to repetition. The statutory definition thus treated is as follows:

"(a) 'The unpaid balance'

(b) 'of money or its equivalent'

(c) 'received by a bank'

(d) 'in the usual course of business'

(e) 'and for which it has given or is obligated to give credit'

(f) 'to a commercial, checking, savings, time or thrift account.'"

In our view, the credit extended to the reserve account (that is, the 10% withheld from the purchase price) does not fall within the terms of the statutory definition because it created in both the customer and the bank a right which was only conditional. Whether the customer could utilize this credit depended solely upon performance by the buyer. If the buyer performed his obligation, the purpose for which the so-called deposit was made was accomplished; in that event, the 10% belonged to the customer. On the other hand, in case of default on the part of the buyer, the 10% deposit became that of the bank. As we have noted, this was the purpose of the arrangement between the customer and the bank.

We are unable to discern how it can be held that the credit extended to the reserve account can be characterized as "money or its equivalent received by a bank." It must be certain that the bank received no money from the customer, that it received only the contract which it purchased. Can such a contract be considered as the "equivalent" of money? We think the answer must be in the negative. If the contract be held as the equivalent of cash, we see no reason why the bank should not have paid the customer its face value rather than 90%. It may be that the bank by paying 90% of the face value of the contract recognized it as the equivalent of cash to that extent. By the same token, however, both the bank and the customer recognized the contract to the extent of the 10% withheld as not the equivalent of cash.

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Another serious question is whether defendant was obligated to give credit "to a commercial, checking, savings, time or thrift account." Obviously, the last four named forms of accounts are without application. Plaintiff appears to so recognize but argues that the reserve account was a commercial account because it arose out of a commercial transaction. That is a *non sequitur*. We suppose it is true that the account had its genesis in a commercial transaction but it could not be utilized by the customer in the course of trade or commerce.

At the risk of being repetitious, we again point out the absence of liability upon defendant at the inception of a credit to the reserve account. In any event, it is our view that when Congress predicated the assessment base upon the "amount of liability of the bank for deposits," it encompassed only such deposits as imposed upon the bank an unconditional liability and which conferred upon the depositor an absolute right to be paid the amount of his deposit either upon demand or upon such conditions as might be imposed in connection with the deposit. That certainly is true as to the "checking, savings, time or thrift account" enumerated in the statutory definition of "deposit." We see no reason why it should be less true as to the remaining classification, that is, "commercial."

Plaintiff cites and relies heavily upon *Industrial Bank of St. Louis* v. *Federal Deposit Ins. Corp.*, 93 F. Supp. 916, 918 (E.D.Mo.). Defendant attempts, without much success, to distinguish the situation there involved and that here. While the case supports plaintiff's position, we do not agree with either the reasoning or the result. Neither do we agree that *Union Electric Light & Power Co.* v. *Cherokee Nat. Bank of St. Louis et al.*, 94 F. 2d 517, strongly relied upon by the court in the *Industrial Bank* case, is authority for the result reached. In the *Cherokee* case there was a special arrangement between the de-

positor and the bank by which the bank incurred a fixed obligation to pay. The court held there was a special deposit impressed with a trust in favor of the depositor. It is not claimed in the instant case that the reserve account was impressed with a trust under a provision of the statute, which will be referred to under contested issue 4.

CONTESTED ISSUE 4

This issue involves money withheld by defendant from salaries and wages of its employees for the following purposes: (1) payment of federal income taxes on employees' salaries; (2) payment of employees' share of federal social security taxes; (3) payment of employees' contributions to group life insurance premiums, and (4) purchase of government securities for employees. The period involved is from July 1, 1948 through June 30, 1953. The statutory definition of the term "deposit" both in the 1935 and 1950 Acts includes "trust funds held by such bank whether retained or deposited in any department of such bank." While the 1935 Act contained no definition of "trust funds," such a definition was provided in the 1950 Act (Title 12 U.S.C.A. Sec. 1813 (p)), as follows:

> "The term 'trust funds' means funds held by an insured bank in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent."

We think these withholdings were held by the bank as trust funds either with or without the aid of the statutory definition provided in the 1950 Act. By agreement with their employees such funds were held for specified purposes and the bank was under obligation to apply them in accordance with the agreement. But whether trust funds or not, they were deposits within the meaning of the

statute. It is true, as defendant points out, that such funds do not represent cash received from the employees; however, the withholdings were the equivalent of cash. The situation is the same as though he amounts withheld had been paid to the employees and returned by them to the bank to be used by it for the purposes indicated. The point is that the bank incurred a liability for such funds which was absolute, in contrast to a contingent liability as existed under contested issue 3. We agree with the ruling of the district court on this issue.

The judgment is affirmed in part and reversed in part, with directions that it be vacated and a judgment entered in accordance with the views herein expressed. More specifically, the judgment is affirmed as to contested issues 1, 2 and 4, and is reversed as to contested issue 3.

Appendix II

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Tuesday, June 25, 1957

Before: Hon. J. EARL MAJOR, Circuit Judge
Hon. PHILIP J. FINNEGAN, Circuit Judge
Hon. WALTER C. LINDLEY, Circuit Judge

No. 11933

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellant,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellee.

No. 11934

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED as to contested issues 1, 2 and 4, and is REVERSED as to contested issue 3, and that this cause be remanded to the said District Court with directions that the judgment be vacated and a judgment entered in accordance with the views expressed in the opinion of this Court filed this day.